No. 16274

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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AUTHORIZED SUPPLY COMPANY OF ARIZONA, a Corporation,
*Appellant,*

*vs.*

SWIFT & COMPANY, a Corporation, ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
*Appellees.*

ARIZONA YORK REFRIGERATION COMPANY, a Corporation, and SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, a Corporation,
*Appellants,*

*vs.*

SWIFT & COMPANY, a Corporation,
*Appellee.*

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## ANSWERING BRIEF OF APPELLEE SWIFT & COMPANY

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BOYLE, BILBY, THOMPSON & SHOENHAIR
RICHARD B. EVANS
B. G. THOMPSON, JR.
Ninth Floor Valley National Building
Tucson, Arizona
*Attorneys for Appellee Swift & Company*

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---

## ANSWERING BRIEF OF APPELLEE SWIFT & COMPANY

## FOREWORD

For the purposes of this brief we shall refer to Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company as Appellants and Swift & Company as Appellee. All references to the pages in the transcript will be preceded by T.R.

Appellee agrees that the statement of the case as submitted by Appellants is correct, with one exception. The Appellants state, on page 3 of their opening brief:

> ". . . . the defective coils were returned by plaintiff (Appellee) to defendant Southern Arizona York Refrigeration Company (Appellant) . . ."

The evidence adduced at the trial of this case revealed that the Appellant Southern Arizona York Refrigeration Company replaced the defective coils with new coils with the permission of the Appellee (T.R.-73, 166, 167, 170, 180). Likewise, the trial court found, as a matter of fact, that this was the case (T.R.-32), and this finding of fact by the trial court has not been specified as error by Appellants.

Appellee believes that as between Appellants and itself only two questions are involved:

1. In the case of damages caused by a defective piece of machinery, does a replacement or substitution of the defective piece of machinery by the seller constitute ipso facto a rescission of the contract between the seller and the buyer?

2. Assuming, for the purpose of argument but not conceding that there has been a rescission of the contract, can a buyer rescind a contract and thereafter hold the seller liable for damages resulting from a breach of express and implied warranty of fitness under the laws of the State of Arizona?

## ARGUMENT

1. In the case of damages caused by a defective piece of machinery, does a replacement or substitution of the defective piece of machinery by the seller constitute ipso facto a rescission of the contract between the seller and the buyer?

It is Appellee's contention that there has been no rescission of the contract between Appellant Arizona York Refrigeration Company and Appellee and that the contract between the parties is still in effect.

Furthermore, the contract expressly provides:

> "That the design, materials, and workmanship, of the machinery and all parts of the plant furnished and installed by the Contractor, shall be first-class in every respect, and suitable for the purpose intended.
>
> "That all parts furnished by Contractor are to operate and perform their functions properly and prove durable in reasonable service.
>
> "No payment in part or in whole shall be construed as a waiver of any guarantees of this contract." (Plaintiff's Exhibit 1 in evidence)

In the absence of rescission, under the only logical interpretation of the terms of the contract Appellants are liable for the damages caused by the defective coils sold to Appellee by the Appellant Arizona York Refrigeration Company.

To determine if there has been a rescission, we must ascertain the manner in which contracts can be rescinded.

According to Black on Rescission and Cancella-

tion, 2d Edition, Section 1, page 4, there are several ways to rescind a contract:

(a) By the contract itself reserving to either or both parties the right to rescind on the occurrence of certain conditions.

(b) By mutual agreement of the parties.

(c) By one of the parties rescinding the contract without the consent of the other for legal cause such as fraud or misrepresentation.

(d) By decree of court.

With respect to the case at bar, subparagraph (d) obviously does not apply, and, since an examination of the contract in question (Plaintiff's Exhibit 1) will show that there is no clause relating to rescission, subparagraph (a) does not apply.

The method of rescission described in subparagraph (b) does not apply for the reason that there is nothing in the record that even suggests Appellants and Appellee entered into a mutual rescission agreement.

This leaves the question of whether the method described in subparagraph (c) is applicable or, stated another way, whether a rescission can be implied by Appellee's permitting Appellant Southern Arizona York Refrigeration Company to substitute new coils for admittedly defective coils.

The case controlling on this point is *Clyde Equipment Co. v. Fiorito et al,* 16 F. 2d 106, decided by this Court. According to the facts, the plaintiff was a road builder who bought road machinery from the defendant. When the machinery proved defective, plaintiff returned it to the defendant and was given credit, and

thereafter plaintiff brought suit to recover special damages for breach of warranty. Defendant contended there was a rescission. This Court held:

> "The mere fact that personal property sold under a contract is returned to the vendor and credit given therefor on the account, does not constitute ipso facto a rescission of the contract. Whether or not property so returned and credited constitutes an abandonment of that part of the contract covering it is a matter of intention."

If the law, as stated in *Clyde Equipment Co. v. Fiorito et al* is correct, the key to this case lies buried in the question of "What was Appellee's intention when it allowed Appellant Southern Arizona York Refrigeration Company to replace the defective coils with new coils?"

To answer the question let us see what alternatives faced Appellee. First, Appellee could have refused to permit Appellants to remove the defective coils from the freezer room until the matter was finally settled by litigation. This, of course, would have rendered the freezer room unusable. Appellants suggest, citing a case from the City Court of Rochester, New York, *Bennett v. Piscitello,* 170 Misc. 177, 9 N Y S 2d 69, that it was the duty of Appellee to retain the damaged goods and sue for all damages resulting. If Appellee had followed this course, the freezer room would still be out of use, damages would still be accruing, and Appellants would be arguing that Appellee had failed to perform its fundamental duty to minimize the damages.

The other alternative was to do what Appellee did —permit Appellants to minimize the damages they

had caused, as much as possible, by substituting new coils for the defective coils.

We submit that if this Court holds that Appellee intended to rescind the contract in question, the Court is stating in essence that Appellee was willing and intended to excuse Appellants for a loss which has cost Appellee almost $10,000. It is counsel's opinion there is no evidence in the record to support such a conclusion.

2. Assuming, for the purpose of argument but not conceding that there has been a rescission of the contract, can a buyer rescind a contract, and thereafter hold the seller liable for damages resulting from a breach of express and implied warranty of fitness under the laws of the State of Arizona?

For the sake of this argument we will assume:

(a) That Appellee did intend to rescind the contract in this case, and

(b) That Appellee, instead of permitting substitution of the defective coils, returned the defective coils to Appellants.

The general rule is well known, namely, that upon a sale of personal property where the goods do not measure up to the warranty, the buyer has an election to return the goods and rescind the sale or to keep the goods and sue for damages.

However, exceptions prove the general rule. In this case the exception to the general rule is ARS Section 44-270:

> "Nothing in this chapter shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law inter-

> est or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed."

Counsel for Appellee have been unable to discover any Arizona cases involving an interpretation of ARS Section 44-270. However, there are three recent cases from other jurisdictions which have discussed the effect of this section. The first case, decided by the Maryland Court of Appeals, was *Martha F. Russo v. Hochschild Kohn and Co., Inc.,* 184 Md. 462, 41 A. 2d 600, 157 A.L.R. 1070, mentioned in Appellants' brief. The facts were that plaintiff purchased hair lacquer pads worth $1.10 from the defendant and later returned them to the defendant at defendant's request and received a credit. Defendant's counsel made the same contention which Appellee does in the case at bar; namely, no other remedy can be granted the buyer once he has elected to return the goods. A majority of the court held:

> "That the contract . . . even if rescinded as to ordinary damages was not rescinded with reference to special damages, and that action in assumpsit on the contract will lie to recover special damages directly resulting from the breach of warranty of fitness."

*Marko v. Sears Roebuck & Co.,* 24 N.J. Super 295, 94 A. 2d 348 (1953) involved the following situation:

Plaintiff went to defendant's store and advised defendant's employee that he wanted a lawn mower to be used on uneven ground to cut grass and weeds. The catalog description of the lawn mower contained the following: "blade completely shielded". After plaintiff purchased the lawn mower, he operated it for a short time until the machine came in contact with a

rock. Upon striking the rock the machine bounced back and injured plaintiff. While in the hospital plaintiff requested a friend to return the lawn mower and obtain a refund, which was done. Thereafter plaintiff sued for damages on the ground of breach of an express warranty.

Defendant's motion for dismissal was granted by the trial court at conclusion of plaintiff's case. On appeal, the defendant argued, as Appellants do here, that plaintiff had elected the remedy of rescission and that, therefore, no other remedy for breach of warranty could be granted because of the New Jersey statute (R.S. 46:30-75 (2) N.J.S.A.) identical to ARS Section 44-269 B:

> "When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted."

The court in the *Marko* case held that damages for personal injuries resulting from a breach of warranty would be allowed "despite the fact that there has been a rescission and a repayment of the purchase price."

*Garbark v. Newman,* 155 Neb. 188, 51 NW 2d 315, follows the holding of the *Russo* and *Marko* cases. Furthermore, the *Garbark* case decided by the Nebraska court in 1952 is in direct conflict with the case of *Henry v. Rudge and Guenzel Co.,* 118 Neb. 260, 224 NW 294, decided by the same court in 1929, which is relied upon by the Appellants.

In the cases cited by Appellants in support of their contention, we find no mention of any statute such as ARS Section 44-270, which saves special damages. As stated in the *Marko v. Sears Roebuck & Co.* case:

> "The purpose and effect of the provision of the

Uniform Sales Act that the buyer or seller may recover special damages in any case where the law permits the recovery of such damages is to permit the recovery of special damages without regard to whether the transaction to which they are incidental has been rescinded or affirmed."

## CONCLUSION

The judgment of the trial court must be affirmed on either of the following grounds:

1. Appellee did not rescind the contract with Appellant Arizona York Refrigeration Company and is entitled to recover all damages flowing from the breach of the express and implied warranties of fitness that the coils supplied by Appellant would perform their function properly.

2. If it could be found that Appellee rescinded the contract, Appellee is nonetheless entitled to recover damages from Appellants by virtue of ARS Section 44-270.

Respectfully submitted,

BOYLE, BILBY, THOMPSON & SHOENHAIR
RICHARD B. EVANS
B. G. THOMPSON, JR.
*Attorneys for Appellee*
*Swift & Company*
Ninth Floor
Valley National Building
Tucson, Arizona

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Three copies of the within Brief of Appellee Swift & Company, a corporation, were received this_____ day of May, 1959.

DARNELL, HOLESAPPLE, McFALL & SPAID

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*Attorneys for Appellees*
Arizona York Refrigeration Company and Southern Arizona York Refrigeration Company
410 Valley National Building
Tucson, Arizona

MAY, LESHER & DEES

---

*Attorneys for Appellant*
Authorized Supply Company of Arizona
706 Arizona Land Title Building
Tucson, Arizona